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IN MEETING ITEM

22

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

BRIAN C. McNEIL
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

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DATE: FEBRUARY 8, 2002

DOCKET NOS: T-03911A-01-0448 and T-04011A-01-0645

AZ CORP COMMISSION
DOCUMENT CONTROL

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Teena Wolfe.
The recommendation has been filed in the form of an Order on:

TOUCHAMERICA SERVICES, INC. and
MONTANA POWER COMPANY
(WAIVER OF RULES)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of
the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the
Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

FEBRUARY 19, 2002

The enclosed is NOT an order of the Commission, but a recommendation of the
Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively
been scheduled for the Commission's Working Session and Open Meeting to be held on:

FEBRUARY 26, 2002 and FEBRUARY 27, 2002

For more information, you may contact Docket Control at (602)542-3477 or the
Hearing Division at (602)542-4250.

Arizona Corporation Commission

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BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL
CHAIRMAN

3 JIM IRVIN
COMMISSIONER

4 MARC SPITZER
COMMISSIONER

5
6 IN THE MATTER OF THE APPLICATION OF
7 TOUCHAMERICA SERVICES, INC. FOR A
8 WAIVER OF PUBLIC UTILITY HOLDING
COMPANIES AND AFFILIATED INTERESTS
RULES (A.A.C. R14-2-801 ET SEQ.)

DOCKET NO. T-03911A-01-0448

9 IN THE MATTER OF THE JOINT APPLICATION
10 OF THE MONTANA POWER COMPANY AND
11 ITS WHOLLY OWNED SUBSIDIARY,
12 TOUCHAMERICA, INC., FOR A WAIVER OF
PUBLIC UTILITY HOLDING COMPANIES AND
AFFILIATED INTERESTS RULES (A.A.C. R14-2-
801 ET SEQ.)

DOCKET NO. T-04011A-01-0645

DECISION NO. _____

ORDER

13 Open Meeting
14 February 26 and 27, 2002
Phoenix, Arizona

15 **BY THE COMMISSION:**

16 On May 31, 2001, Touch America Services, Inc. filed with the Arizona Corporation
17 Commission ("Commission") the above-captioned application for a permanent general waiver of the
18 Commission's Public Utility Holding Companies and Affiliated Interests Rules, A.A.C. R14-2-801 et
19 seq. ("Rules"), or in the alternative, for a partial waiver of the Rules that is consistent with its
20 operation as a competitive telecommunications services provider in Arizona.

21 On August 9, 2001, the Montana Power Company and Touch America, Inc. filed the above-
22 captioned joint application for a permanent general waiver of the Rules.

23 On November 30, 2001, the Commission's Utilities Division Staff ("Staff") filed a Staff
24 Report in the above-captioned dockets recommending that the two matters be consolidated and that
25 the Commission approve a limited waiver of the Rules without a hearing.

26 Because the above-captioned matters are substantially related and the rights of the parties will
27 not be prejudiced by the their consolidation, they will be consolidated.

28 * * * * *

1 Having considered the entire record herein and being fully advised in the premises, the
2 Commission finds, concludes, and orders that:

3 **FINDINGS OF FACT**

4 1. Touch America Services, Inc. ("TASI") is an Arizona public service corporation
5 authorized to provide facilities-based interexchange telecommunications services and alternative
6 operator services in Arizona. The Commission granted Touch America Services, Inc. a Certificate of
7 Convenience and Necessity ("CC&N") to provide those services in Decision No. 62672 (June 30,
8 2000).

9 2. Touch America, Inc. ("TAI") is TASI's parent company. TAI is a wholly-owned
10 subsidiary of Entech, Inc., which is a wholly-owned subsidiary of Montana Power Company.

11 3. Montana Power Company is a Montana corporation whose stock is publicly traded on
12 the New York Stock Exchange. Montana Power Company is currently divesting all of its energy
13 business, including its electric and gas utility, and will invest the proceeds in TAI.

14 4. On May 31, 2001, TASI filed an application for a permanent general waiver of the
15 Rules.

16 5. In the alternative, TASI's application requests a partial waiver of the Rules as follows:

17 a. TASI and its parent and affiliates be required to file a notice of intent to
18 organize or reorganize a public utility holding company under A.A.C. R14-2-803 only
19 for those organizations or reorganizations that are likely to have a material adverse
20 impact on TASI;

21 b. No cumulative threshold or "exempt" amount, such as those adopted by
22 Decision No. 58063, apply to any organization or reorganization planned by TASI, its
23 parent and affiliates that would have a material adverse impact on the Arizona
24 jurisdiction;

25 c. With respect to A.A.C. R14-2-804(B)(1), which requires a utility to obtain
26 Commission approval before obtaining a financial interest, or guaranteeing, or
27 assuming the liabilities of an unregulated affiliate, TASI and its parent and affiliates
28 be required to seek prior approval under A.A.C. R14-2-804(B)(1) only for transactions

1 which are likely to have a material adverse effect on Arizona operations;

2 d. Likewise, with respect to A.A.C. R14-2-804(B)(3), which requires a utility to
3 obtain Commission approval before using utility funds to form a subsidiary or divest
4 itself of an established subsidiary, TASI and its parent and affiliates be required to
5 seek prior approval under A.A.C. R14-2-804(B)(3) only for transactions which are
6 likely to have a material adverse effect on Arizona operations;

7 e. Waiver of all other requirements of A.A.C. R14-2-804, including that TASI
8 need not report on loans, evidences of indebtedness, and all other transactions that
9 occur between and among TASI and its parents and affiliates in the ordinary course of
10 business, and which would likely fall under A.A.C. R14-2-804; and

11 f. Waiver of the annual reporting requirements in A.A.C. R14-2-805, because the
12 above modifications to A.A.C. R14-2-803 and A.A.C. R14-2-804 should be sufficient
13 to capture and expose affiliated transactions which are likely to have a material
14 adverse effect on the Arizona jurisdictional operations.

15 6. In support of its application, TASI asserts that it operates in a highly competitive
16 environment that, in conjunction with the Commission's existing regulatory measures, effectively
17 protects customers from cross-subsidization or other activities that could detrimentally affect service
18 to its customers. TASI claims that it has no incentive or ability to charge unduly high or above-
19 market prices that could be used to fund or subsidize unregulated affiliates or to commingle utility
20 and non-utility funds in a manner that is harmful to Arizona consumers.

21 7. TASI further asserts in support of its application that because TASI's Arizona
22 operations represent such a small percentage of the total revenue and investment of the company and
23 its subsidiaries, application of the Rules to TASI would be unreasonably costly and burdensome.

24 8. On August 9, 2001, Montana Power Company and TAI filed a joint application for a
25 permanent general waiver of the Rules. The August 9, 2001 application also generally describes the
26 restructuring of Montana Power Company from an energy and telecommunications utility into a
27 telecommunications company.

28 9. In their applications, TASI, TAI and Montana Power Company all request that the

1 Commission's order be issued *nunc pro tunc* if necessary, retroactive to the date on which the Rules
2 became applicable to TASI.

3 10. On November 16, 2001, TASI and TAI agreed to waive the thirty day timeline set
4 forth in A.A.C. R14-2-806 as it pertains to these applications.

5 11. On November 30, 2001, Staff filed a Staff Report on the application of TASI and on
6 the joint application of TAI and Montana Power.

7 12. In the Staff Report, Staff states that in the current competitive environment, the Rules
8 may be unnecessarily restrictive and expensive to comply with, and that the telecommunications
9 services market may replace the historical need for the Rules for some companies.

10 13. Staff believes that the competitive nature of the services the Applicants provide, and
11 the lack of incentives for them to engage in the activities that the Rules are designed to prevent,
12 reduce the need for Commission oversight over their relationships with affiliates. Staff stated,
13 however, that the Commission may desire to continue its current policy of granting limited waivers to
14 telecommunications companies to prevent harm in the event the telecommunications market
15 contracts.

16 14. In the Staff Report, Staff recommended that the applications be consolidated, and that
17 the Commission grant the Applicants a partial waiver of the Rules retroactive to the time when TASI
18 became a Class A public utility in Arizona. Staff recommended that the partial waiver be granted
19 without a hearing.

20 15. In the Staff Report, Staff recommended that the partial waiver be granted as follows:

21 a. TAI and its affiliates should be required to file a notice of intent to enter into
22 the transactions listed in A.A.C. R14-2-803 when a transaction is likely to result in
23 significant increased capital costs of the Arizona operations; significant additional
24 costs allocated or charged directly to the Arizona jurisdiction; or significant reduction
25 of net income to the Arizona operations;

26 b. that for A.A.C. R14-2-804, that the Commission should require TAI and its
27 affiliates to seek approval only for transactions that are likely to have a material
28 adverse effect on Arizona operations; and

c. that the Commission grant to TAI and its affiliates a complete waiver of A.A.C. R14-2-805 for 30 months.

16. The May 31, 2001 and August 9, 2001 applications are substantially related and the rights of the parties will not be prejudiced by their consolidation.

17. As a competitive telecommunications carrier in Arizona, TASI competes directly with numerous other competitive interexchange carriers.

18. Although the competitive nature of the telecommunications market may reduce the need for Commission oversight over Applicants' affiliate relationships to the extent contemplated by the Rules, it is not reasonable for the Commission to grant the Applicants a complete waiver of the Rules at this time.

19. Staff's recommendations for a partial waiver of the Rules as set forth in Findings of Fact Nos. 14 and 15 above are reasonable.

CONCLUSIONS OF LAW

1. Touch America Services, Inc. is a public service corporation within the meaning of Article 15 of the Arizona Constitution and Title 40 of the Arizona Revised Statutes.

2. Absent a waiver of A.A.C. R14-2-803, TASI, TAI and Montana Power would be required to provide notice to the Commission for every internal reorganization they undertake.

3. The Commission has jurisdiction over this matter and has authority to issue this Order and pursuant to A.A.C. R14-2-801 *et seq.*

4. The applications should be consolidated.

5. Touch America Services, Inc. should be granted a limited waiver of the Rules in accordance with Staff's recommendations as set forth in Findings of Fact Nos. 14 and 15 above.

ORDER

IT IS THEREFORE ORDERED that the applications of Touch America Services, Inc., Montana Power Company, and Touch America, Inc. for waivers of the Commission's Affiliated Interests Rules are hereby consolidated.

IT IS FURTHER ORDERED that the applications of Touch America Services, Inc., Montana Power Company, and Touch America, Inc. for complete waivers of the Commission's Affiliated

1 Interests Rules are hereby denied.

2 IT IS FURTHER ORDERED that Touch America Services, Inc., and its affiliates are hereby
3 granted partial waivers of the Commission's Affiliated Interests Rules as described in the Ordering
4 Paragraphs below, retroactive to the date on which the Arizona jurisdictional revenues of Touch
5 America Services, Inc. caused it to become classified a Class A Utility under Commission Rules.

6 IT IS FURTHER ORDERED that Touch America, Inc. and its affiliates shall be required to
7 file a notice of intent to enter into the transactions listed in A.A.C. R14-2-803 only in each of the
8 following three instances: 1) when a transaction is likely to result in significant increased capital
9 costs of the Arizona operations; 2) when a transaction is likely to result in significant additional costs
10 allocated or charged directly to the Arizona jurisdiction; and 3) when a transaction is likely to result
11 in significant reduction of net income to the Arizona operations.

12 IT IS FURTHER ORDERED that Touch America, Inc. and its affiliates shall be required to
13 seek approval for the transactions listed in A.A.C. R14-2-804 only for those transactions that are
14 likely to have a material adverse effect on Arizona operations.

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1 IT IS FURTHER ORDERED that Touch America, Inc. and its affiliates are hereby granted a
2 complete waiver of A.A.C. R14-2-805 for 30 months.

3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
5

6
7 CHAIRMAN

COMMISSIONER

COMMISSIONER

8
9 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
10 Secretary of the Arizona Corporation Commission, have
11 hereunto set my hand and caused the official seal of the
12 Commission to be affixed at the Capitol, in the City of Phoenix,
13 this ____ day of _____, 2002.

14 BRIAN C. McNEIL
EXECUTIVE SECRETARY

15 DISSENT _____
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1 SERVICE LIST FOR:

TOUCHAMERICA SERVICES, INC., MONTANA
POWER COMPANY, AND TOUCHAMERICA, INC.

2 DOCKET NO.:

T-03911A-01-0448 ET AL.

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